***United States Court of Appeals***

***for the***

***District of Columbia Circuit***


# TRANSCRIPT OF RECORD

671

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23.055

UNITED STATES OF AMERICA,

V

PHILLIP JOHNSON,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

# BRIEF FOR THE APPELLANT

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## TABLE OF CASES



* The starred cases are those chiefly relied on.

## STATEMENT OF ISSUES PRESENTED*

Appellant here presents a single issue - that there was insufficient substantial evidence to permit the case to go to the jury, and that therefore it was error on the part of the court below to deny the defendent his motion for a judgment of acquittal.

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* This case has not been previously presented to this Court.

## REFERENCES AND RULINGS

The decision of the trial court to deny the defendant's motion for a judgment of acquittal is set forth on page 34 of the Reporter's Transcript of Proceedings.

## STATEMENT OF THE CASE

Phillip Johnson, the defend ant was arrested in the early morning hours of May 18, 1968 (Tr. p. 5). His original detention by the arresting officer, whether or not an arrest, was for the purpose of questioning him concerning an alleged fight with, or the beating of, one Patricia Harris (Tr. p. 24), a former girl friend (Tr. p. 30).

The arresting officer, Gray, and his partner, Abney, were cruising in a scout car in the 600 block of Acker Street, N. E., in the District of Columbia, at about 2:00 A. M. when they were hailed from a doorway (Tr. pp. 4, 5) by either Jesse Harris, the brother of Patricia (Tr. pp. 4, 5), or by Miss Harris and her mother (Tr. pp. 15, 16). After talking with either Mr. Harris (Tr. p. 16) or with Miss Harris (Tr. p. 16) they walked down the block and accosted Johnson. Between them they brought him back to the vicinity of the Harris home, either voluntarily on his part (Tr. p. 5) or involuntarily (Tr. p. 20), for some questioning. There he became unruly and pushed one of the officers (Tr. pp. 17, 22) and was struck in return (Tr. p. 21) or perhaps he stood quietly talking with the officers (Tr. p. 6). It may be that he became belligerent later on and managed to strike both officers (Tr. p. 6), but on the other hand it is equally plausible that he never struck anyone (Tr. p. 51).

In any event, once they had reached the vicinity of the Harris home, voluntarily or involuntarily, and the defend-

ant, ruly or unruly, was talking with the officers, Johnson's younger brother, Saunders, a juvenile (Tr. p. 35), who had been drinking (Tr. p. 41), secured a baseball bat from alongside his house, approached the group, and knocked Officer Abney unconscious by hitting him on the head with the bat (Tr. p. 6). Immediately prior to that moment Johnson was spread-eagled against a parked automobile (Tr. p. 37) and Jesse Harris had stabbed him in the stomach with an umbrella (Tr. pp. 37, 46), for which Johnson was later taken to the hospital (Tr. pp. 8, 10).

Immediately after, according to Officer Gray, Saunders was subdued by Gray's nightstick, Johnson struck at both Abney (who was sitting in a dazed condition on the sidewalk) and Gray, and then took off toward his house. Gray took off after him, brought him back, some more blows were allegedly exchanged, and Johnson, now that reinforcements had arrived, was placed in a patrol wagon (Tr. pp. 7, 13, 14).

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## ARGUMENT

> The trial court has a duty to refuse to grant a motion for a judgment of acquital unless at the close of the government's case, with all the substantial evidence assumed to be true and all inferences favorable to the government drawn therefrom the jury would be obligated to return a verdict of not guilty. On the other hand, if, once all the evidence is in, a reasonable man could have a reasonable doubt, then the motion should be granted, and if it is not, and there has been an entry of judgment of guilty after a verdict, this Court has the right and the duty to set that judgment aside and to acquit the defendent.

I

Whether the court below erred in refusing to grant a judgment of acquital on the defendent's motion can only be determined by an examination of the evidence, establishing if there would necessarily have to be a reasonable doubt[1] as to the guilt of the defendant, assuming the truth[2] and substance[3] of the testimony, considering that testimony in the light most favorable to the government, and drawing what inferences there were to be drawn.

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1. Evidence must be sufficiently strong to banish all reasonable doubt. U.S. v Markowitz, 176 F Supp 681; U.S. v Long, 153 F Supp 528, reversed 257 F2d 340.

2. On a motion for a directed verdict the judge must assume the truth of government's evidence and give the government the benefit of all legitimate inferences that may be drawn from that evidence. Crockett v U.S., 234 F2d 560. In like vein, the government's testimony must be assumed, arguendo, to be true. U.S. v Fielding, 148 F Supp 46, reversed 251 F2d 878, 102 U.S. App. D.C. 167; U.S. v Kelly, 119 F Supp 217.

3. U.S. v Garvin, 71 F Supp 545.

It is evident at the outset that there is a great deal of contradiction in the testimony of the government witnesses, and although it is well settled that contradiction alone in evidence is not sufficient to withhold a case from the jury it is equally well settled that there must be substantial evidence, i.e., evidence which is probative and which leaves no reasonable doubt in the minds of reasonable men, before the jury may consider it.

Officer Gray testified that the officers were hailed by Jesse Harris, that he talked with Harris, that as a result of that conversation he and Officer Abney went after Johnson, that Johnson came back to the vicinity of the Harris home voluntarily and that he was peaceful until after Abney was hit by the bat; that thereafter he began to strike at both officers, ran toward his house, was apprehended and was brought back.

Officer Abney, on the other hand, testifies that they were hailed by two women, Miss Patricia Harris and her mother, that they talked with Miss Harris, that as a result of that conversation they went after Johnson who was taken back forcibly and was unruly and pushed him once they were back at the Harris home. Some moments later Abney was struck and understandably had no recollection of what transpired subsequently.

It is significant that neither officer testified to the stabbing of Johnson, although we know, not only from the defendant, but from Gray himself, that Johnson was hospital-

ized. We also know that Johnson was being held by the officers at the time the stabbing occurred. Is it not as reasonable to suppose that thereafter Johnson was struggling with Gray not for the purpose of resisting arrest, which, under the circumstances he had a right to,[4] but to get home (which he tried to do) because of the wound he had received? Is it not reasonable to suppose that a man who has just been stabbed and whose arms are being held will struggle merely to fulfill the natural reaction of placing his hand over the wound?

The only corroboration of any assault by the defendant on either of the officers came from Miss Harris, who testified, "I saw two officers struggling with Phillip and his brother", but that, by the testimony of the officers themselves had to be inaccurate because only one officer, Gray, could possibly have struggled with both the defendant and his brother at the same time.

Mrs. Harris, the remaining government witness, first testified only that Gray was trying to take the bat from Saunders while Phillip ran, but later, on prodding by the prosecutor, stated that it looked like Gray and Johnson were scuffling.

This is meager testimony, certainly, of an assault. Add to it Mrs. Harris' contradiction of her own testimony concerning her son, Jesse Harris. On direct examination she said

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4. It would appear that the officers had no right to apprehend Johnson or hold him against his will, inasmuch as there had been no complaint of a felony, and the officers had not seen him commit a breach of the peace or other disdemeanor in their presence.

II

That the trial court is in error is obvious. Had it given greater consideration to the matter, even while the jury was deliberating, it would surely have given judgment of acquittal during that period, or a judgment n.o.v. after the jury's return and finding. If it is true, as it surely must be, that the trial judge is obligated to grant a motion for acquittal unless the evidence is sufficiently strong to banish all reasonable doubt,[5] then there was error. Even assuming the truth of the government's evidence and giving the government the benefit of all legitimate inferences to be drawn from it,[6] whose testimony was to be believed? Which of the government witnesses is to be believed? Whose testimony, if anyone's, is 100% accurate? And should a judge not take as seriously the falsus in uno instruction as he would have his jurors take it?

Having passed the first step, a ruling at the time of the motion, and the defense then putting on its case, it became obligatory on the part of the trial judge to reassess the total evidence against the standard of reasonable doubt.[7] With that as a yardstick, the case had no right to go to the jury, for the defense testimony, given the consideration it merited,[8] would give rise to reasonable doubt.

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5. See note 1, supra.

6. See note 2, supra.

7. Hemphill v U.S., 312 U.S. 657, 61 S. Ct. 729, 85 L. Ed. 1106; U.S. v Cascade Linen Supply Corp. of N.J., 160 F Supp 565.

8. U.S. v Gasomiser Corp., 7 F.R.D. 712.

no more than that he was in the vestibule with her; under cross-examination she finally admitted that he was "about" the police officer and the defendant, and later that "Phillip was struggling down the street ... with the officer." This, however, again contradicts the testimony of Officer Gray, who was in the best position to know if Phillip struggled with him "down the street".

None of the witnesses for the defense testified that Johnson hit either of the officers, although all testified, directly or indirectly, that a struggle was taking place. Significantly, this struggle took place after the stabbing, at which point, it will be remembered, Johnson wanted only to get home to take care of the wound.

Although, according to Officer Gray, it was Jesse Harris who first called, "Police, police," and was variously mentioned as being either close to or far from the action, he was not called as a witness by the government. That he was not called by the defendant is not nearly so surprising, for at best he would make a hostile witness. Yet, if Harris was in fact at the scene, as described, he would have provided excellent corroboration for Gray, and, assuming arguendo that he was in fact the one who stabbed Johnson, he could have been granted immunity in exchange for assisting the government in making its case.

Inasmuch as there was not sufficient substantial evidence to exclude every other hypothesis but that of guilt, it was the duty of the trial judge to give the defendant judgment, as this Court held in Hammond v U.S., 127 F2d 752, 75 U.S. App. D.C. 397.

The trial court having failed in its duty to acquit, it becomes incumbent upon this Court to assume, in effect, the role of the trier of fact. In doing so, it must, as required by Cephus[9], consider all the evidence in its review, and if it appears from all the evidence that there is bound to be a reasonable doubt then it must order the judgment vacated and enter a judgment of acquittal. Similarly, if all substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse the court below and give judgment to the accused.[10]

Even if the trial court did see in the evidence and the deducible inferences therefrom reason to deny the motion, this Court should still follow the rule that where all the substantial evidence is as consistent with innocence as with guilt a reversal is required, for it does not conflict with that rule by which the trial judge is guided.[11]

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9. U.S. v Cephus, 324 F2d 893

10. Hammond v U.S., 127 F2d 752, 75 U.S. App. D.C. 397;
Tri-Angle Club, Inc. v U.S., 265 F2d 829;
U.S. v Ginn, 124 F Supp 658, reversed 222 F2d 289.

11. Yoffe v U.S., 153 F2d 570.

## CONCLUSION

Appellant submits that the trial judge erred in refusing to grant defendant's motion for a judgment of acquittal, and that this Court, having the inherent right to correct such an error, should do so by setting aside the entry of judgment against the defendent and entering a judgment of acquittal.

Respectfully submitted,

Abraham Dobkin
Attorney for appellant

## MEMORANDUM TO THE COURT

Counsel for the appellant has been troubled by what he believes to have been a bad arrest in the first instance, and that therefore Johnson would have had the right to use a reasonable amount of force to resist that arrest. This is evident from the note (4) on page 6 of this brief. However, since the point was not raised by trial counsel, it would appear that it is probably improper for appellant to raise it here. However, inasmuch as this Court has the right to investigate any matter sua sponte, it may be that this point could be given some attention.

Similarly, much thought was given to trial counsel's objection to the trial judge's response to the jury's request for additional information. Counsel here is of the opinion that the additional instruction did nothing to assist the jury, but left it in its original position. It is, accordingly, counsel's opinion that the verdict was of the kind that we find too often, i.e., a compromise verdict. Again, the Court may wish to look into and consider this matter, but it is not either technically raised or argued by appellant.

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## Certificate of Service

I certify that a copy of the foregoing Brief For Apellant was personally served at the office of the United States Attorney for the District of Columbia, United States Courthouse, Washington, D. C., this 15th day of June, 1968.

Abraham Dobkin